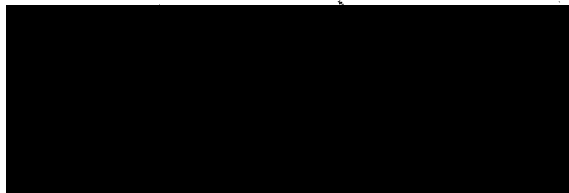




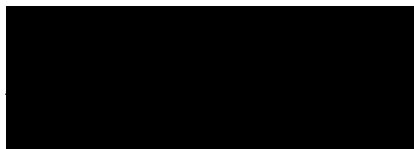
U.S. Citizenship
and Immigration
Services

B6



FILE: WAC 03 069 54253 Office: CALIFORNIA SERVICE CENTER Date: SEP 09 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

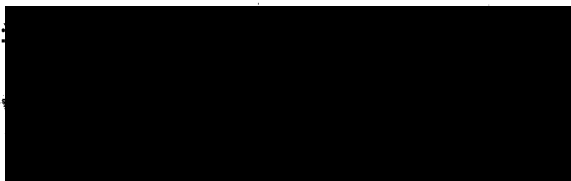
ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

CC:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian food restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian-style food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and maintains that it has had the continuing financial ability to pay the proffered wage.¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 10, 2000. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ The petitioner filed the appeal. An individual has also submitted a Notice of Entry of Appearance as Attorney or Representative (Form G-28). As no evidence of authorization pursuant to the requirements of 8 C.F.R. § 292.1 has been submitted by this individual, he will not be considered as an authorized representative.

On the petition, the petitioner claims to have been established in 1998, to have a gross annual income of \$1,191,015, and to currently employ twenty-five workers. In support of its ability to pay the beneficiary's proposed wage offer of \$24,024, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. These tax returns reveal the following information:

| | 2000 | 2001 |
|---------------------|-----------|----------|
| Net income | -\$ 2,885 | \$38,962 |
| Current Assets | -\$12,826 | \$16,950 |
| Current Liabilities | \$ -0- | \$ -0- |
| Net current assets | -\$12,826 | \$16,950 |

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 8, 2003, the director requested additional evidence pertinent to that ability. The director advised the petitioner that the evidence shall be in the form of annual reports, federal tax returns, or audited financial statements. The director specifically instructed the petitioner to submit a copy of its 2002 tax return.

In response, the petitioner submitted a copy of an application for automatic extension of time to file its federal tax return. The tax year for which the extension was requested was not given, but the application for extension of time had been signed on March 12, 2003. The petitioner also submitted a copy of a State, Local and District Sales and Use Tax Return, which was printed in the petitioner's name, but was otherwise completely blank.

The director determined that, except for the year 2001, the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 18, 2003, denied the petition.

On appeal, the petitioner submits a letter from Hugo H. Rodriguez & Associates, an accountancy/income tax management firm, dated September 19, 2003. Unaudited financial statements covering a period from January 1st through June 30th, 2003, accompany the letter, signed by Mr. [REDACTED] Mr. [REDACTED] asserts that the petitioner's depreciation expense of \$17,073, taken on its 2000 tax return,² should be added back to the petitioner's net income. He also maintains that the petitioner invested \$28,200 in fixed assets in 2000, which decreased the value of its current assets, but that the petitioner's ability to pay remains. He further states that the petitioner's increase in gross sales from 2000 through 2003 should also be considered in reviewing its ability to pay the beneficiary's proffered salary.

The unaudited financial statements that have been submitted on appeal are not persuasive evidence of the petitioner's continuing ability to pay the proffered salary. According to the plain language of 8 C.F.R. §

² It is not clear where the \$17,073 appears on the 2000 tax return. The depreciation expense claimed on line 20 of tax return is \$13,773.

204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements offer little probative value as they essentially represent the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As noted by the director, the record in this case does not reflect that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. For that reason, Mr. [REDACTED] suggestion that the petitioner's increase in gross income is rejected because it does not taken into account the expenses incurred in order to generate the petitioner's gross income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The AAO rejects, however, the claim that a petitioner's fixed assets should have been considered in the determination of the ability to pay the proffered wage. Moreover, it is unclear where the figure of \$28,200, representing investment in fixed assets, appears on the petitioner's 2000 tax return. Fixed assets do not represent a readily available source out of which to pay the proffered wage. The petitioner's total assets including fixed depreciable assets are those that a petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) of Form 1120. Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. In this case, as set forth above, the petitioner's net current assets in 2000 were -\$12,826 and do not represent sufficient funds to pay the proffered wage.

In this case, although, as noted by the director, the petitioner's 2001 corporate tax return showed sufficient net income to pay the proffered wage, neither the petitioner's net income of -\$2,885, nor its -\$12,826 in net current assets reported in 2000, could have covered the proposed wage offer of \$24,024. Moreover, the petitioner has provided no competent evidence, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), to convincingly demonstrate its ability to pay the proffered wage in 2002 or subsequently.

Upon review of the financial data contained in the record, the AAO concludes that the petitioner's evidence has not established its continuing financial ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.